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In the Supreme Court of the United States

OCTOBER TERM, 1995

TAREK ELAGAMY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has been "physically present in the United States for a continuous period of not less than ten years" since the grounds for his deportation arose, as required for eligibility for suspension of deportation under 8 U.S.C. 1254(a)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 68 F.3d 465 (Table). The decision of the Board of Immigration Appeals (Pet. App. 4-7) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1995. The petition for a writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen and native of Egypt who entered the United States as a non-immigrant student in May 1982. In September 1983, after his marriage to a United States citizen, petitioner's immigration status was adjusted to that of lawful permanent resident. Pet. 4-5, Pet. App. 8-9.

In September 1986, petitioner was convicted in the United States District Court for the Eastern District of Louisiana of having made a materially false statement in his application for permanent resident status, in violation of 18 U.S.C. 1546. Petitioner was sentenced to five years' imprisonment, but the court suspended the sentence in favor of a five-year period of probation. Pet. 5.

2. Three months later, the Immigration and Naturalization Service (INS) issued an order to show cause why petitioner should not be deported pursuant to Section 241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(5) (1982).[1] See Pet. App. 5-6; Pet. 5-6. Section 241(a)(5) provides that an alien "shall, upon the order of the Attorney General, be deported" if he "has been convicted under section 1546 of title 18." At a hearing held on April 20, 1988, petitioner was found deportable and his applications for political asylum and withholding of deportation were denied. Pet. App. 11-14. That decision was upheld by the Board of Immigration Appeals on June 24, 1992, and by the United States Court of Appeals for the Fifth Circuit. Pet. 6; see also *Elagamy* v. *INS*, 990 F.2d 626 (1993) (Table).

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[1] This provision was renumbered by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 602, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(3)(B)(iii).

3. In August 1993, petitioner filed with the Board a motion to reopen his deportation proceedings in order to apply for suspension of deportation under Section 244(a)(2) of the INA, 8 U.S.C. 1254(a)(2). Pet. 6. Section 244(a)(2) requires, *inter alia*, that the applicant have been "physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation." Petitioner contended that he had satisfied the physical presence requirement, because ten years had passed since he committed the offense that ultimately resulted in his criminal conviction. Pet. App. 6. Relying on *In re Lozada*, 19 I. & N. Dec. 637, 640 (BIA 1988), the Board concluded, however, that "the 10-year period is measured from the date of the conviction." Pet. App. 6. The Board explained that "[a]lthough the commission of the act may have occurred in 1983, it did not become 'a ground for deportation' until [petitioner] was convicted of that act on September 10, 1986." *Id.* at 6-7. Because petitioner failed to satisfy the "physical presence" requirement, the Board denied petitioner's motion to reopen. *Id.* at 7.

4. The court of appeals denied a petition for review, finding petitioner's appeal "without arguable merit and * * * frivolous." Pet. App. 2. The court explained that in *Brown* v. *INS*, 856 F.2d 728 (5th Cir. 1988), it had decided the same issue, finding that the alien was ineligible "for suspension of deportation pursuant to § 1254(a)(2) because he had not been in the United States for ten years since the date of his *conviction* of a deportation-worthy crime." Pet. App. 2.

ARGUMENT

Petitioner renews his claim that the ten-year period of physical presence required by Section 244(a)(2) should commence to run when the alien commits a deportation-worthy criminal offense, rather than from the date of his conviction for that offense. The court of appeals correctly rejected that claim, and its decision does not conflict with the decision of any other court of appeals.

1. Section 244(a)(2) provides that the ten-year period commences to run "immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation." 8 U.S.C. 1254(a)(2). Petitioner was ordered deported under Section 241(a)(5), which provides that an alien must be deported if he "has been convicted under section 1546 of title 18." 8 U.S.C. 1251(a)(5) (1982). Under the plain terms of those provisions of the INA, the "ground" for ordering petitioner's deportation arose when he was "convicted under" 18 U.S.C. 1546. As the Board correctly explained, "[a]lthough [petitioner's offense] may have occurred in 1983, it did not become a 'ground for deportation' until he was convicted * * * on September 10, 1986." Pet. App. 6-7. It is from that date, therefore, that the ten-year period must run in petitioner's case.

Petitioner offers no reason to depart from that textual analysis, but instead relies heavily on his own conception of the policies that underlie Section 244(a)(2). See Pet. 9-11. Petitioner's interpretation leads to irrational results, because, under his view, a criminal alien who evaded arrest for ten years would become eligible for suspension under Section 244(a)(2) sooner than one who turned himself in, confessed, and

pleaded guilty. And, even if petitioner's interpretation were plausible, "it would be too much to say that the statute 'cannot bear the interpretation adopted by' the" Board. *Reno* v. *Koray*, 115 S. Ct. 2021, 2027 (1995) (quoting *Sullivan* v. *Everhart*, 494 U.S. 83, 91-92 (1990)). Because the Board's view represents a "permissible construction of the statute," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), it is entitled to deference.[2]

2. There is no merit to petitioner's claim that the decision below conflicts with decisions of other courts of appeals. The issue of how to calculate the ten-year

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[2] Petitioner also suggests that the Board's position has changed over time. The cases on which petitioner relies, however, do not support his claim. In *In re M*, 5 I. & N. Dec. 261 (BIA 1953), the issue before the Board was how to reconcile apparently conflicting statutory directions that, on the one hand, required a showing of good moral character, and, on the other, barred a finding of good moral character if an alien had been incarcerated. The Board made clear, however, that "it was not the commission of the offense, but the conviction, which constitutes a ground for deportation," *id.* at 265—the same principle articulated in *In re Lozada*, *supra*. The Board's decision in *In re Bufalino*, 11 I. & N. Dec. 351 (BIA 1965), is similarly inapposite. In that case, the provision of the INA setting forth the ground of deportation identified acts, not convictions. The alien had committed two acts, each of which rendered him deportable; the issue simply was whether the ten-year period began to run from the first or from the second act. *Id.* at 357-358. In any event, even if the Board had changed its position over the years, it was not estopped from doing so. See *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993). Any change in the agency's position "might reduce, but would not eliminate," the deference owed to its interpretation. *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995).

physical presence requirement was simply not presented in most of the cases cited by petitioner. See *Cortes-Castillo* v. *INS*, 997 F.2d 1199, 1203 n.2 (7th Cir. 1993) ("parties do not dispute that Cortes has met" the physical presence requirement); *Reid* v. *INS*, 756 F.2d 7, 8 n.5 (3d Cir. 1985) ("Reid has not asked us to review his claim for relief from deportation under section 244(a)(2) of the Act"); *United States ex rel. Marcello* v. *District Dir., INS*, 634 F.2d 964, 978 (5th Cir.) ("It is undisputed that the respondent has met the ten-year continuous physical presence requirement"), cert. denied, 452 U.S. 917 (1981); *Rassano* v. *INS*, 492 F.2d 220, 223 (7th Cir. 1974) ("The Service concedes that petitioner has met the ten-year continuous residence [*sic*] requirement"). Similarly, in *Leon-Hernandez* v. *INS*, 926 F.2d 902, 906 (9th Cir. 1991), while the court noted that the "last of the crimes for which Leon-Hernandez was convicted was committed on October 21, 1981, less than ten years ago," the alien was ineligible for relief irrespective of whether the ten-year period was computed from the conviction or from the commission of the offense. The same was true in *Rodriguez* v. *INS*, 9 F.3d 408, 414 (5th Cir. 1993).

In the remaining two cases relied upon by petitioner, the discussion of the "physical presence" requirement also was *dicta*. In *Borokinni* v. *INS*, 974 F.2d 442, 445 n.1 (4th Cir. 1992), the court merely noted in passing that the alien would not be "eligible to seek suspension of deportation until May 1993, ten years after he committed his heroin offenses." And *United States* v. *Santelises*, 509 F.2d 703 (2d Cir. 1975), actually involved an alien's claim that he would not have pleaded guilty to a criminal charge if he had understood that the conviction could be used as a

ground for his deportation. After rejecting that claim on the merits, *id.* at 704, the court went on to suggest that the alien's circumstances (as portrayed by his counsel) were sufficiently sympathetic that the INS would not "be remiss in its duty if it were to wait the few months necessary" for the alien to attain eligibility under Section 244. It was in that context that the court noted, in a footnote, that the alien "may already be eligible" because more than ten years had elapsed since the crimes were committed. *Id.* at 704 n.2. That off-hand reference on an issue that was not presented is insufficient to place the Second Circuit in conflict with the decision of the court of appeals in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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